

**THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
)	
v.)	ID#: 0008014266
)	IN-00-09-0382-R1, 0383-R1,
DERRICK L. JACKSON,)	0385-R1, 0386-R1
Defendant.)	
)	

ORDER

**Upon Defendant's Untimely Motion for Postconviction Relief –
*SUMMARILY DISMISSED***

1. On January 25, 2002, Defendant was sentenced as a habitual offender¹ to twenty years in prison on two counts of Burglary in the second degree. Defendant also was sentenced to probation for related crimes.

2. Defendant's conviction was affirmed² and the mandate was filed on September 26, 2002.

3. On March 16, 2011, through counsel, Defendant filed this, his first motion for postconviction relief under Superior Court Criminal Rule 61.

4. Defendant admits that the motion was filed beyond Rule 61's time

¹ 11 Del.C. § 4214 (a).

² *Jackson v. State*, 804 A.2d 1066 (Del.2002)(TABLE).

limit.³ Without citation to the rule or other authority, Defendant implicitly invokes the miscarriage of justice exception to the Rule's time limit.⁴ Specially, Defendant alleges:

The bars to relief are inapplicable since this motion sets forth a miscarriage of justice because of the constitutional violation that undermined the fundamental legality, reliability, integrity and fairness of the proceedings leading of the proceedings leading to the judgment of conviction.

5. Defendant alleges that trial counsel "provided constitutionally ineffective assistance" in two ways.

6. First, Defendant complains that trial counsel failed to object when one of the burglary victims testified that one of the investigating police officers "indicated that he had been looking for this guy." Defendant concludes, without citation, that the testimony:

was not only hearsay and inadmissible in violation of defendant's confrontation clause rights under the Delaware and United States Constitutions, but also constituted bad act evidence[,] which led the jury to believe that the defendant had committed other bad acts[,] which were not set forth in the trial.

³ Super. Ct. Crim. R. 61(i)(1).

⁴ Super. Ct. Crim. R. 61(i)(5).

Defendant further concludes:

Defense counsel's failure to object to this testimony constituted ineffective assistance of counsel. This failure to object prejudiced the defendant in that the jury was led to believe that he committed other bad acts.

7. Defendant's ineffective assistance of counsel claim fails to establish a miscarriage of justice at several levels. It incorrectly assumes that a mere allegation of ineffective assistance of counsel defeats the time limit's bar to relief.

8. The argument is also incorrect because the declarant identified the officer who said he had been looking for Defendant as "a Dan McGonagle or - I'm not sure of his last name. . . ." Presumably, the declarant was referring to Delaware State Police detective, Dan F. McColgan. Detective McColgan testified, which reduces Defendant's claim here to trial counsel's failure to object to the declarant's non-responsive answer, which may have implied that the police had an interest in Defendant for reasons going beyond the burglaries at issue.

9. Defendant's argument that the failure to object amounts to ineffective assistance of counsel is conclusory. More importantly, Defendant's allegation that, "[t]his failure to object prejudiced the defendant in that the jury was led to believe that he committed other bad acts[,]" is unestablished.

10. Most importantly, if the jury had concluded from the passing comment that Defendant had committed other bad acts, that surely had no bearing on the trial's outcome. As discussed below, the State's case was overwhelming. Among other things, Defendant was caught fleeing with the stolen property.

11. Defendant's other time-barred claim is that one of the two burglaries "involves the theft of a bicycle from a garage. It is the defendant's position that a garage is not a dwelling under the . . . burglary statutes at the time of this offense." And, to further ring the bell, Defendant argues that trial counsel's failure to raise that argument was also ineffective assistance of counsel.

12. As to the garage, the court recalls that it was attached to the victim's house and it was not a separate structure. Defendant does not allege, much less present evidence supporting his contention.

13. More importantly, as to the garage, although the victim of that burglary testified that the burglary only resulted in his wife's bicycle being stolen, that was only because the victim surprised and confronted Defendant inside the dwelling proper. The victim testified that he stepped out of his first-floor bedroom, and discovered Defendant "on the rug . . . a couple steps in." The victim said, "Hey, what are you doing in my house?" Defendant then asked "if [an unknown person named] Harold was here?" After the victim and Defendant exchanged a few more

words about “Harold,” the victim said, “Yeah okay, hold on a minute. I will be right back.” In the few moments it took for the victim to locate his baseball bat and return to finish the conversation properly, Defendant fled, apparently taking the bicycle. Simply put, the jury heard ample evidence from which it would have concluded that Defendant not only entered the garage intending to commit theft, he also entered the house proper, intending to commit theft there. Defendant’s legal argument about the definition of “garages” in 2000 is trumped by the evidence.

14. Finally, as mentioned above, Defendant’s actual guilt was all but certain. He was seen by the police peddling away from the burglaries on one victim’s bicycle and carrying the other victim’s VCR. Part of what attracted police attention to Defendant was that an officer noticed that Defendant was wearing gloves on a warm August day. Then came the eyewitness identification. And, so on. Defendant does not claim actual innocence, probably because he was so obviously guilty.

15. After proper referral and preliminary review, it plainly appears from the motion and the record that Defendant is not entitled to relief. His claim is barred by Rule 61's time limitation, and he has not come close to establishing a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity and fairness of the proceedings leading to the judgment of conviction. To the contrary, it appears that

there was no constitutional violation of any sort, and Defendant's conviction was otherwise fair and just.

For the foregoing reasons, Defendant's untimely motion for postconviction relief is **SUMMARILY DISMISSED**. The Prothonotary **SHALL** notify Defendant's counsel.

IT IS SO ORDERED.

Date: April 8, 2011 /s/ Fred S. Silverman

Judge

cc: Prothonotary (Criminal)
Stephen M. Walther, Deputy Attorney General
Edward C. Gill, Esquire